SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 583

JOSEPH PATERNO,

Petitioner,

vs.

JOHN A. LYONS, AS COMMISSIONER OF CORRECTION OF THE STATE OF NEW YORK

BRIEF FOR PETITIONER, JOSEPH PATERNO

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Jurisdictional Statement

Jurisdiction of this Court is invoked under Section 237 of the Judicial Code (28 U. S. C. 344) which empowers this Court to require, by certiorari, that there be certified to it for review and determination, any cause determined by the highest court of the state, where any title, right, privilege, or immunity is claimed under the United States Constitution. The petitioner, Joseph Paterno, contends that the decision of the New York Court of Appeals violates

the Fifth and Fourteenth Amendments of the United States Constitution because it deprives him of his liberty without due process of law.

This Court in No. 233 Misc. on February 9, 1948, granted relief to proceed in forma pauperis and granted writ of certiorari to the Court of Appeals of the State of New York.

Statement of Case

The petitioner, Joseph Paterno, was indicted by the Erie County Grand Jury on October 30, 1936 for the crime of criminally receiving stolen property (R. 16) in violation of Section 1308 of the New York Penal Law. Arraigned on this charge he pleaded not guilty. Subsequently, on April 14, 1937, the District Attorney filed a recommendation with the County Court that the defendant be permitted to plead guilty to the crime of attempted grand larceny, second degree (R. 17). The court accepted the plea of the defendant to the new charge and on July 16, 1937 petitioner was sentenced to a term of one year and three months to two years and six months, the execution of which was suspended and petitioner was placed on probation conditioned on the making of restitution. The probation in this case was completed.

On the 17th day of November, 1941, the petitioner was indicted by a grand jury in Chautauqua County for the crime of robbery in the first degree and pleaded guilty to robbery in the second degree. The petitioner admitting that he was the same person convicted of the crime of attempted grand larceny, second degree, in Erie County, on April 14, 1937, was sentenced as a second felony offender for a term of not less than fifteen years nor more than thirty years. The petitioner is serving that sentence.

The petitioner has made a series of applications and motions. On September 10, 1943, he moved in the Chautau-

qua County Court for an order to correct the information filed which accused him of being the same person convicted in Erie County on April 14, 1937. This motion was denied, as reported in *People* v. *Paterno*, 182 Misc. 491, 50 N. Y. S. (2nd) 713 (R. 21).

On November 22, 1943, he filed a writ of habeas corpus in the County Court of Wyoming County challenging the validity of the Erie County conviction. The writ was dismissed but the petitioner was remanded to the custody of the sheriff of Chautauqua County for resentence as a first offender upon the determination by the County Court of Wyoming County that the Erie County judgment was invalid. This order was entered on January 8, 1944, presumably on the authority of *People ex rel. Wachowicz* v. *Martin*, 267 A. D. 803, 47 N. Y. S. (2nd) 291. This case was subsequently reversed in *People ex rel. Wachowicz* v. *Martin*, 293 N. Y. 361, 57 N. E. (2nd) 531 (R. 21). The County Judge of Chautauqua County resentenced the petitioner to time already served, a period of about two years. The state and the warden of the prison appealed this change of sentence. The Appellate Division of the Fourth Department reversed the order of the County Judge of Wyoming County and remanded the petitioner to the Custody of the warden of Attica Prison for reasons further found in the Tracher case (*People ex rel. Tracher* v. *Martin*, 268 App. Div. 955, 51 N. Y. S. (2nd) 697). The effect of this action was to reinstate the original sentence by the Chautauqua County Court (R. 21-22).

On the 11th day of September, 1945, the petitioner again moved the County Court of Chautauqua County to correct the information on the basis that the Erie County judgment was erroneous. This motion was denied (R. 22).

Finally, on the 27th day of November, 1945, the petitioner filed the present motion in the Erie County Court in which

be had originally pleaded guilty to attempted grand larceny in the second degree on April 14, 1937 (R. 22). This motion was to vacate the sentence, to permit the withdrawal of the plea of guilty, and enter a plea of not guilty.

Summary of Argument

1. THE APPELLANT HAS BEEN DEPRIVED OF A FUNDAMENTAL RIGHT THROUGH THE ACCEPTANCE OF HIS PLEA IN VIOLATION OF THE CONSTITUTION OF THE STATE OF NEW YORK.

2. THERE IS NO REMEDY AVAILABLE TO APPELLANT EXCEPT THIS MOTION TO SET ASIDE THE JUDGMENT IN THE COURT OF ORIGINAL JURISDICTION.

3. THE ERIE COUNTY COURT HAS INHERENT POWER TO SET ASIDE ITS ERRONEOUS JUDGMENT WHICH DEPRIVED APPELLANT OF A FUNDAMENTAL RIGHT.

4. FUNDAMENTAL RIGHTS OF PETITIONER SHOULD NOT BE DENIED ON TECHNICAL GROUNDS WHEN THE EFFECT OF SUCH IS TO DEPRIVE HIM OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW.

ARGUMENT

The appellant has been deprived of a fundamental right through the acceptance of his plea in violation of the Constitution of the State of New York.

The indictment in the Erie County Court charged the offense of Criminally Receiving Stolen Property in violation of Section 1308 of the New York Penal Law. The court's acceptance of the plea of guilty to the crime of attempted grand larceny second degree under this indictment was for all practical purposes a permitting of the District Attorney to amend the indictment to include this new crime for which the grand jury had not indicted the accused.

Admittedly the charge of attempted grand larceny second degree is a felony under New York Penal Law and as such can only be laid by indictment of a grand jury because

Article I, subd. 6 of the Constitution of the State of New York provides—

> "No person shall be held to answer for a capital or other infarmous crime unless on a presentment or indictment of a grand jury . . . ."

The decisions of the State of New York confirmed the fact that acceptance of the plea in the Erie County Court was erroneous. *People* v. *Miles*, 289 N. Y. 360. In this case, at page 364, the court amongst other things said—

> "Accordingly, prosecutions must be conducted in substance and without essential change as the Constitution commands. A conviction otherwise obtained is a nullity."

In the case of *People ex rel. Wachowicz* v. *Martin*, 293 N. Y. 361, 57 N.E. (2nd) 53, the court stated that a judgment entered upon an erroneous determination of the question of law by a court of competent jurisdiction is not a nullity and may not be challenged by a writ of *habeas corpus*. The plea in this case was identical with that in the petitioner's case. The Court of Appeals in this case did not say what the remedy was except to declare that the remedy was not *habeas corpus*.

There is no remedy available to appellant except this motion to set aside the judgment in the court of original jurisdiction.

The State of New York urges that the petitioner might have moved in arrest of judgment or taken an appeal. However, neither of these steps would be consistent with a plea of not guilty.

A motion in arrest of judgment would be limited by Section 331 of the Code of Criminal Procedure to a plea of guilty (L. 1881 c. 442) (R. 9).

Section 467 of the Code of Criminal Procedure (R. 9-10) would not be available to the petitioner because although that section permits such a motion, "on a plea or verdict of guilty," defendant must establish one of the grounds in Section 331 of the Code of Criminal Procedure in order to prevail. That ground would be that the court had no jurisdiction over the subject of the indictment, or that the facts stated do not constitute a crime. Under the *Wachowicz* case, however, it has already been determined that the facts do constitute some crime and that the Trial Court had jurisdiction over the subject of the indictment.

The only possible course left to the petitioner would be an appeal from the judgment itself as contemplated in Section 515 of the Code of Criminal Procedure, L. 1884 c. 372 s. 1 eff. May 28, 1884 (R. 9). However, in the case of *Lyons* v. *Goldstein*, 290 N. Y. 19, and the case of *People* v. *Wright*, 263 A. D. 1020, 33 N. Y. S. (2nd) 1009, it was held that no appeal would lie from a judgment of conviction entered upon a plea of guilty.

It is of interest to note that in the dissent opinion in the *Wachowicz* case, at page 369, it was stated—

> "It is urged that the only available remedy was by appeal from the judgment of conviction. But one who pleads guilty may not appeal unless the judgment is totally void, and if it be void then he is entitled to habeas corpus."

The majority of the Court, however, in this case held that the judgment was not void. If the judgment in this case is not void then it must be concluded that no appeal would have been available to this petitioner from the judgment based upon his plea of guilty. A study of the State of New York's position in this case makes most pertinent the language used by Mr. Justice Rutledge in his concurring

opinion in the case of *Marino, Petitioner*, v. *Ragen, Warden Illinois State Penitentiary*, decided December 22, 1947—

> "It is that the Illinois procedural labyrinth is made up entirely of blind alleys, each of which is useful only as a means of convincing the federal courts that the state road which the petitioner has taken was the wrong one. If the only state remedy is the possibility that the Attorney General will confess error when he determines that a flagrant case will not survive scrutiny by this Court, it is hardly necessary to point out that the federal courts should be open to a petitioner even though he has not made his way through several courts applying for habeas corpus, then writ of error, and finally coram nobis. * * *
>
> "* * * If the federal guarantee of due process in a criminal trial is to have real significance in Illinois, it is imperative that men convicted in violation of their constitutional rights have an adequate opportunity to be heard in court. This opportunity is not adequate so long as they are required to ride the Illinois merry-go-round of habeas corpus, coram nobis, and writ of error before getting a hearing in a federal court. * * * We should neither delay nor deny justice, nor clog its administration with so useless and harmful a procedural strangling of federal constitutional rights."

The Erie County Court has inherent power to set aside its erroneous judgment which deprived appellant of a fundamental right.

In the case of *Lyons* v. *Goldstein*, 290 N. Y. 19, the Court pronounced as follows:

> "The inherent power of a court to set aside its judgment which was procured by fraud and misrepresentation cannot be doubted. *Furman* vs. *Furman*, 153 N. Y. 309, 47 N. E. 577, 60 Am. St. Rep. 629; Matter of Holden, 271 N. Y. 212, 2 N.E. 2d 631. No logical distinction can be made between such power over judgments in civil cases and such power over judgments in criminal cases.

There is nothing unique about a judgment or its execution in criminal cases which excepts it from the rules applicable to judgments generally and the inherent powers of the courts with reference to them. The power was exercised in criminal cases at common law through the writ of error coram nobis. *Robinson* vs. *Johnston*, 9 Cir., 118 F. 2nd 998; *United States* vs. *Mayer*, 238 U. S. 55, 67, 35 S. Ct. 16, 59 L. Ed. 129. If the judgment may be reviewed and set aside on the ground that it was procured by fraud, no reason presents itself why the court may not then permit the withdrawal of a plea of guilty because the record is then the same as if no judgment had ever been rendered. Indeed, it is settled that to deny a person an opportunity to be heard on proof that he was defrauded or coerced into pleading guilty to a crime would impair a constitutional right. *Walker* vs. *Johnston*, supra; *Waley* vs. *Johnston*, supra. It would be an extraordinary reversal of all precedent to deny to a competent tribunal power over its own judgments in either civil or criminal cases."

Again, in the case of *People* v. *Gersewitz*, 294 N. Y. 163, the Court said:

"We have sanctioned the exercise of such a power by a court to correct its own record or to set aside an order or judgment which was induced by fraud or procured in violation of a constitutional right of a party. Perhaps that power can have no broader scope. No case has been presented to the court in which the court was called upon to define its exact limits, but in March, 1943, this court authoritatively decided (three judges dissenting) that a court of criminal jurisdiction has 'inherent' power to set aside a judgment procured by fraud and misrepresentation and to permit a defendant to withdraw a plea of guilty induced by violation of his constitutional rights (citing case); and in *Matter of Morhous* vs. *N. Y. Supreme Court* (293 N. Y. 131), we held that a motion to vacate a judgment procured by violation of the defendant's constitutional rights is the

corrective judicial process which is authorized by the law of the State to remedy the alleged wrong to the defendant and that it adequately meets the requirement of 'due process'."

It would seem to follow that if a court has an inherent right to set aside its judgment procured through fraud or misrepresentation it would have the same power to set aside its judgment entered by error. If the District Attorney had made a misrepresentation to the appellant under these cases there would appear no question that the judgment could be set aside. Certainly it would seem that the petitioner would be as much misled if he acquiesced in erroneous procedure by the District Attorney and the Court as he would if he had been deliberately told a falsehood.

The procedure followed by the petitioner in this case and which is now before this court has previously been considered in the case of *Gayes, Petitioner, v. State of New York*, decided by this Court on June 23, 1947. In the last paragraph of page 2 majority opinion Mr. Justice Frankfurter states as follows:

> "In accordance with New York procedure, Gayes pro se, filed in the County Court of Monroe County, New York, an application to vacate the judgment rendered against him in that court on July 28, 1938."

On page three of the dissent in this case, written by Mr. Justice Rutledge, the following is stated:

> "Under all the New York decisions which have passed upon the questions, the proper and apparently the necessary procedure, see *People* vs. *Keller*,— Misc.—, 37 N. Y. S. 2d 61, 62, for attacking a sentence as second offender, upon the ground that the former conviction was invalid, is first by motion in the court imposing the initial sentence to vacate it, after which if the motion is successful the sentence for the second offense may be attacked and vacated."

The only difference in the procedure followed in the Gayes case and this case is that in the Gayes case the Supreme Court of New York being the court of last resort in that particular situation, the case was certified from there to the Supreme Court. In this case the Erie County Court Justice having announced his intention to vacate the sentence, was then prohibited from doing so by the Appellate Division of the Supreme Court of New York, from which decision there was the right of appeal to the Court of Appeals of the State of New York, which court is the last resort that the petitioner had in the State of New York.

Fundamental rights of petitioner should not be denied on technical grounds when the effect of such is to deprive him of his liberty without due process of law.

No one contends that the original plea of guilty and sentence thereon in the Erie County Court has any justification in law, but on the contrary all concede it was completely without support in law. The question here presented, therefore, is whether or not that which should be done in law will be done or whether it will be defeated of accomplishment because of technicality.

In this connection it would appear quite appropriate to quote the very pertinent words of Mr. Justice Frankfurter in the case of *Malinski* vs. *New York*, 324 U. S. 416-417, wherein he states——

> "To come concretely to the present case, the question is not whether the record permits a finding, by a tenuous process of phychological assumptions and reasoning, that Malinski by means of a confession was forced to self-incrimination in defiance of the Fifth Amendment. The exact question is whether the criminal proceedings which resulted in his conviction deprived him of the due process of law by which he was constitutionally entitled to have his guilt determined.

> Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. The fact that judges among themselves may differ whether in a particular case a trial offends accepted notions of justice is not disproof that general rather than idiosyncratic standards are applied. An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review. But there cannot be blind acceptance even of such weighty judgment without disregarding the historic function of civilized procedure in the progress of liberty."

The opinion of Mr. Justice Ward (R. 20-29) is a most erudite analysis of the law applicable to this situation and neither the memorandum decision of Justice Batt of the Supreme Court of New York (R. 3-11) nor the bare memorandum decision of the Court of Appeals, State of New York, 75 N.E. (2nd) 630, 631, 297 N. Y. 617, constitutes an answer to Justice Ward's position.

Conclusion

The premises considered, it is urged that the Writ of Prohibition granted by Honorable Paul J. Batt, Justice of the Supreme Court of New York, enjoining and prohibiting

the Erie County Judge from hearing and determining the motion and petition of the petitioner, be reversed and the County Court of Erie County, New York, directed to vacate and set aside the sentence of the petitioner on the 14th day of April, 1937, for the crime of attempting grand larceny second degree, and that leave be granted to the petitioner to withdraw plea of guilty heretofore entered and interpose a plea of not guilty.

Respectfully submitted,

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